

personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2021-020 and should be submitted on or before April 13, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁸

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91345; File No. SR-NASDAQ-2020-057]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Allow Companies To List in Connection With a Direct Listing With a Primary Offering in Which the Company Will Sell Shares Itself in the Opening Auction on the First Day of Trading on Nasdaq and To Explain How the Opening Transaction for Such a Listing Will Be Effected

March 17, 2021.

On September 4, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) ¹ of the Securities Exchange Act of 1934 (“Act”) ² and Rule 19b-4 thereunder, ³ a proposed rule change to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange and to explain how the opening transaction for such a listing will be effected. The proposed rule change was published for comment in the **Federal Register** on September 21, 2020.⁴ On November 4, 2020, pursuant to Section 19(b)(2) of the Act,⁵

the Commission designated a longer period within which to either approve or disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁶ On December 17, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act ⁷ to determine whether to approve or disapprove the proposed rule change.⁸ On February 22, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on March 2, 2021.⁹

Section 19(b)(2) of the Act ¹⁰ provides that, after initiating proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of the filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for comment in the **Federal Register** on September 21, 2020.¹¹ The 180th day after publication of the Notice is March 20, 2021. The Commission is extending the time period for approving or disapproving the proposal for an additional 60 days.

The Commission finds that it is appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change, as modified by Amendment No. 1, along with the comments received on the proposal. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,¹² designates May 19, 2021, as the date by which the Commission should either approve or disapprove the proposed rule change (File No. SR-NASDAQ-2020-057), as modified by Amendment No. 1.

⁶ See Securities Exchange Act Release No. 90331 (November 4, 2020), 85 FR 71708 (November 10, 2020).

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 90717 (December 17, 2020), 85 FR 84025 (December 23, 2020).

⁹ See Securities Exchange Act Release No. 91205 (February 24, 2021), 86 FR 12245 (March 2, 2021).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ See *Supra* note 4.

¹² 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91338; File No. SR-CboeEDGX-2021-014]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Applicable to the EDGX Top Feed

March 17, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 4, 2021, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (“EDGX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to amend the fees applicable to the EDGX Top Feed. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

¹³ 17 CFR 200.30-3(a)(57).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁴⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057.htm>.

⁵ 15 U.S.C. 78s(b)(2).

statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the fees applicable to the EDGX Top Feed,³ which is an uncompressed data feed that offers both top-of-book quotations and execution information based on equity orders entered into the System.⁴ Specifically, the Exchange proposes to: (1) Increase the fee for internal distribution of the EDGX Top Feed; and (2) introduce Professional User fees for internal Professional Users of the EDGX Top Feed.⁵ The current fees for external distribution of the EDGX Top Feed will continue to apply, without change, including various incentive programs that the Exchange has adopted to facilitate the provision of lower-cost market data to retail and other investors.⁶

³ The Exchange initially filed the proposed fee changes on January 4, 2021. See Securities Exchange Act Release No. 90923 (January 14, 2021), 86 FR 6719 (January 22, 2021) (SR-ChoeEDGX-2021-002). On March 4, 2021, the Exchange withdrew that filing and submitted this proposal.

⁴ See EDGX Rule 13.8(c).

⁵ A Professional User of an Exchange Market Data product is any User other than a Non-Professional User. See EDGX Schedule of Fees, Market Data Fees, Definitions. A "Non-Professional User" of an Exchange Market Data product is a natural person or qualifying trust that uses Data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) Registered or qualified in any capacity with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. *Id.*

⁶ See e.g., EDGX Schedule of Fees, EDGX Top, Small Retail Broker Distribution Program; EDGX Schedule of Fees, Financial Product Distribution Program. The Small Retail Broker Distribution Program is a pricing program offered by the Exchange that allows small retail brokers that purchase top-of-book market data from the Exchange to benefit from discounted fees for access to such market data. The Financial Product

Market Background

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."⁷ As the Commission itself recognized, the market for trading services in NMS stocks has become "more fragmented and competitive."⁸

Equity trading is currently dispersed across sixteen exchanges, including three new U.S. equities exchanges that launched trading in 2020, 32 alternative trading systems,⁹ and numerous broker-dealer internalizers and wholesalers, all competing fiercely for order flow. Based on publicly-available information, no single U.S. equities exchange has more than 20% market share.¹⁰ In turn, the market for top-of-book quotation and transaction data is highly competitive as national securities exchanges compete vigorously with each other to provide efficient, reliable, and low-cost data to a wide range of investors and market participants. In fact, there are twelve competing products offered by other national securities exchanges today,¹¹ not counting products offered by the Exchange's affiliates, and each of the Exchange's affiliated U.S. equities exchanges also offers similar top-of-book data. Each of those exchanges offer top-of-book quotation and last sale information based on their own

Distribution Program lowers the cost of distributing Derived Data based upon the Exchange's top-of-book offerings, including Derived Data that is often used by retail investors.

⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) ("Regulation NMS Adopting Release").

⁸ See Securities Exchange Act Release No. 84875, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Transaction Fee Pilot for NMS Stocks Final Rule) ("Transaction Fee Pilot").

⁹ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atstlist.htm>.

¹⁰ See Choe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.choe.com/us/equities/market_share/.

¹¹ Competing top of book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BQT, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, IEX TOPS, MIAx PEARL Equities Top of Market Feed, and MEMX MEMOIR Top.

quotation and trading activity that is substantially similar to the information provided by the Exchange through the EDGX Top Feed.¹² Exchange top-of-book data is therefore widely available today from a number of different sources.

Fees for Internal Distribution of the EDGX Top Feed

Currently, the Exchange charges a modest fee of \$500 per month for internal distribution of EDGX Top Feed data,¹³ i.e., distribution within the distributor's own firm,¹⁴ and does not charge any additional fees for internal distribution based on the number of Professional or Non-Professional Users that receive access to this information. These internal distribution fees have been in place, without change, since early 2015 when the Exchange first began offering the EDGX Top Feed.¹⁵ In the time since, the Exchange has made a number of significant enhancements to its platform, including notably the introduction of priority for retail limit orders,¹⁶ that have resulted in improved trading opportunities for investors and, consequently, more valuable market data.¹⁷

As discussed, the Exchange now proposes to increase certain fees applicable to firms that consume this

¹² For example, The Nasdaq Stock Market LLC ("Nasdaq") offers "Nasdaq Basic" which is a real-time market data product that offers best bid and offer and last sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center and trades reported to the FINRA/Nasdaq Trade Reporting Facility ("Nasdaq TRF"). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(a). The type of information contained on the EDGX Top Feed is substantially similar to that offered through Nasdaq Basic, except that the Exchange disseminates information about quotes and trades on EDGX, whereas Nasdaq Basic provides information about quotes and trades on Nasdaq and the Nasdaq TRF. Other national securities with competing top-of-book products also offer substantially similar types of information through those top-of-book products.

¹³ See EDGX Schedule of Fees, EDGX Top, Internal Distribution.

¹⁴ The Exchange's fee schedule defines an Internal Distributor of an Exchange Market Data product as a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity. See EDGX Schedule of Fees, Market Data Fees, Definitions.

¹⁵ See Securities Exchange Act Release No. 74282 (February 17, 2015), 80 FR 9487 (February 23, 2015) (SR-EDGX-2015-09).

¹⁶ See Securities Exchange Act Release No. 87200 (October 2, 2019), 84 FR 53788 (October 8, 2019) (SR-ChoeEDGX-2019-012) (Approval Order).

¹⁷ The Exchange is also about to extend its early trading hours to begin at 4:00 a.m. ET, which would similarly provide additional value to EDGX Top subscribers who would receive additional information about quotes and trades on EDGX during the Early Trading Session. See Securities Exchange Act Release No. 90509 (November 24, 2020), 85 FR 77310 (December 1, 2020) (SR-ChoeEDGX-2020-056).

data as internal distributors, *i.e.*, firms that use EDGX Top Feed data for internal purposes as opposed to firms that distribute such data externally to its customers. As proposed, the Exchange would increase the monthly charge for internal distribution of EDGX Top Feed data to \$750 per month, which would continue to be significantly cheaper than similar products offered by the Exchange's main competitors.¹⁸ In addition, the Exchange would introduce Professional User fees for internal Professional Users of the EDGX Top Feed. Those Professional User fees will be the same as the modest fee currently charged for external distribution of the EDGX Top Feed, *i.e.*, \$4 per month for each Professional User. There would continue to be no charge associated with internal distribution to Non-Professional Users. Further, as discussed, the current fees for external distribution of the EDGX Top Feed would continue to apply, without change, including various incentive programs that the Exchange has adopted to facilitate the provision of lower-cost market data to retail and other investors. As a result, the Exchange believes that the proposed fee changes would allow it to be appropriately compensated for the value of its market data, particularly from professional financial services firms that use that data for internal purposes, while simultaneously ensuring that its data would continue to be available to a wide range of investors and market participants at a cost that facilitates widespread availability of such data.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹⁹ in general, and furthers the objectives of Section 6(b)(4),²⁰ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data. In addition, the Exchange believes that the proposed rule change is consistent with Section 11(A) of the Act as it supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets, and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.²¹ Finally, the proposed rule change is also consistent with Rule 603

of Regulation NMS,²² which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

The Exchange operates in a highly competitive environment. Indeed, with the launch of three new national securities exchanges that trade U.S. equity securities last September, there are now sixteen registered U.S. equities exchanges, and with the exception of Long-Term Stock Exchange, Inc. ("LTSE"), which has determined to not offer any proprietary market data feeds, each of these exchanges offer associated market data products to their customers, either with or without a fee. It is in this robust and competitive market in which the Exchange is proposing to increase its fees, while still providing its data at a significantly lower price than competing products offered by other national securities exchanges with similar data quality.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Further, with respect to market data, the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC* upheld the Commission's reliance on the existence of competitive market mechanisms to evaluate the reasonableness and fairness of fees for proprietary market data: "In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'"²³ The court agreed with the Commission's conclusion that "Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.'"²⁴ As discussed in this filing, significant competitive forces constrain the ability of the Exchange to charge supra-competitive fees.

i. The EDGX Top Feed Is an Optional Market Data Product, and the Exchange Is Constrained in Its Pricing by Significant Competitive Forces

Subscribing to the EDGX Top Feed is entirely optional. The Exchange is not required to make the EDGX Top Feed available to any customers, nor is any customer required to purchase the EDGX Top Feed.²⁵ A customer's decision as to whether to purchase the EDGX Top Feed is therefore entirely discretionary, and is based on that firm's individual business needs. Generally, firms that choose to subscribe to the EDGX Top Feed do so because they believe that it is a cost-effective source for top-of-book data that provides valuable information about the market for national market system ("NMS") stocks traded on the Exchange, where a consolidated display covering all U.S. equities exchanges is not required. Such firms are able to determine for themselves whether the EDGX Top Feed helps them to achieve their business goals, and if so, whether or not it is attractively priced compared to other similar top-of-book products offered by competing exchanges.

Indeed, if the EDGX Top Feed does not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that do not use the EDGX Top Feed. In fact, comparing the number of internal distributors that currently subscribe to the EDGX Top Feed, based on data compiled by the Exchange as of November 2020, to the total number of internal distributors that subscribe to core data offered by the CTA and UTP SIPs, as published on plan websites for Q3 2020,²⁶ less than 1.9% of internal distributors that purchase U.S. equities data choose to subscribe to the EDGX Top Feed.²⁷ The EDGX Top Feed

²⁵ The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See *The Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by Self-Regulatory Organizations*, Release Nos. 34-72182; AP-3-15350; AP-3-15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSs have chosen not to do so.

²⁶ See CTA Quarterly Population Metrics (Q3 2020), available at https://www.ctaplan.com/publicdocs/ctaplan/CTAPLAN_Population_Metrics_3Q2020.pdf; UTP Quarterly Population Metrics (Q3 2020), available at https://www.utpplan.com/DOC/UTP_2020_Q3_Stats_with_Processor_Stats.pdf.

²⁷ This statistic reflects the number of internal distributors that purchase the EDGX Top Feed divided by the number of internal distributors that purchase consolidated market data from the SIPs, as reflected in publicly available information. *Id.*

¹⁸ See *infra* notes 32-39 and accompanying text.

¹⁹ 15 U.S.C. 78f.

²⁰ 15 U.S.C. 78f(b)(4).

²¹ 15 U.S.C. 78k-1.

²² See 17 CFR 242.603.

²³ *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010) ("*NetCoalition I*") (quoting H.R. Rep. No. 94-229 at 92 (1975), as reprinted in 1975 U.S.C.A.N. 323).

²⁴ *Id.* at 535.

therefore represents an insignificant proportion of the market for such market data, and significantly more internal distributors choose not to purchase this product than those that do. Given the insignificant percentage of internal distributors that consume the EDGX Top Feed, it is clear that such firms can and do exercise their right to choose to purchase, or not purchase, this particular market data product. And, as discussed later in this filing, any internal distributor of top-of-book data that does not wish to purchase the EDGX Top Feed, due to the price of that data or for any other reason, can choose to substitute similar information from other exchanges.

Although the Exchange is not required to make any data, including top-of-book data, available through its proprietary market data platform, the Exchange believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. For example, a buy-side investor or fintech firm may choose to purchase the EDGX Top Feed, or a similar product from another exchange, in order to perform investment analysis, or to provide general information about the market for U.S. equity securities, respectively. In either case the choice to purchase the EDGX Top Feed would be based on the firm's determination of the value of the data offered by their chosen product compared to the cost of acquiring this data instead of receiving similar data from other sources. The EDGX Top Feed serves as a valuable reference for investors that do not require a consolidated display. Making alternative products available to market participants ultimately ensures competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees.

Further, in the event that a market data customer views one exchange's top-of-book data product and/or fees as more or less attractive than a competitor's offerings they can and often do switch between competing products. As discussed, similar top-of-book information is available from a number of competing U.S. equities

exchanges.²⁸ This includes a number of large established exchanges that charge for access to such top-of-book data, as well as certain smaller or new exchange entrants that provide similar data without charge, in many cases as a way of attracting customers to their exchange while they seek to grow market share. In this way, the EDGX Top Feed and other top-of-book products offered by a number of U.S. equities exchanges, are all substitutes. The availability of these substitute products constrains the Exchange's ability to charge supra-competitive prices as market participants can easily obtain similar data from one of the Exchange's many competitors. In fact, the impact of competition on the market in which the EDGX Top Feed is offered to market participants and investors is showcased by the Exchange's other recent fee changes related to this product, which involved the *reduction* of fees to facilitate the Exchange's ability to compete for customers.²⁹ And, other exchanges have similarly filed to reduce the prices of their top-of-book data in order to compete with products offered by the Exchange and other competing exchanges.³⁰

Distributors can discontinue use of the EDGX Top Feed at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Indeed, the Exchange's affiliate, Cboe BZX Exchange, Inc. ("BZX"), which also filed to increase fees for its top-of-book product, *i.e.*, the BZX Top Feed, had one internal distributor cancel its subscription to that product as of February 2021 based on its fee increase. Internal distributors of the EDGX Top Feed are free to similarly cancel their subscriptions in favor of a competitor offering, or cheaper or free data offered by the Exchange's affiliated U.S. equities exchanges, if they believe that the fees are too high given their particular use case for obtaining the data that the Exchange provides over the EDGX Top

Feed. The Exchange offers all of its proprietary market data products pursuant to a month-to-month contract that allows subscribers to choose to terminate their subscription at any time. As a result, there are no contractual or other legal impediments for firms that wish to cancel their subscription to the Exchange's market data products, including the EDGX Top Feed. In addition, the Exchange notes that all but one internal distributor of the EDGX Top Feed either receives this data through a market data vendor, as opposed to directly from the Exchange, or is a market data vendor itself. Thus, firms can seamlessly switch to any other competitor product offered by their chosen vendor without incurring additional switching costs, such as the cost of establishing connectivity to another exchange to receive its market data.³¹ Further, based on discussions with the one internal distributor that has chosen not to receive this data through a relationship with a vendor, the Exchange believes that the firm likely has access to a number of competing exchanges from which it could source similar data without incurring significant switching costs.

In setting the proposed fees for the EDGX Top Feed, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. Indeed, the Exchange is not in a position to charge unreasonable fees for its top-of-book data as there are a number of competing products in the market, including products that are currently offered free of charge by certain other exchanges that have determined not to charge for their market data. The existence of alternatives to the EDGX Top Feed ensures that the Exchange cannot set unreasonable fees when vendors and subscribers can freely elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

ii. The Proposed Fees Are Reasonable Given the Value of the Data Provided to Customers, and When Compared to Competing Market Data Products

The proposed fees are also reasonable as even with the proposed fee increase they would continue to represent a relatively modest fee for top-of-book

²⁸ Although the Exchange does not have access to the customer lists for other competing products, it understands based on conversations with subscribers to the EDGX Top Feed that they typically view exchange top-of-book products as substitutes and do not generally look to purchase such data from more than one national securities exchange.

²⁹ See *supra* note 6. The Exchange also notes that while this proposed fee change involves an increase in fees, it is simultaneously filing another proposed fee change to expand its Financial Products Distribution Program and further *reduce* certain fees. See Securities Exchange Act Release No. 90914 (January 13, 2021), 86 FR 6393 (January 21, 2021) (SR-CboeEDGX-2021-003) [sic].

³⁰ See *e.g.*, Securities Exchange Act Release No. 90616 (December 9, 2020), 85 FR 81237 (December 15, 2020) (SR-NASDAQ-2020-086).

³¹ Market data vendors typically establish connectivity to a number of national securities exchanges to be able to offer their market data to customers.

The Exchange does not have similar information about the number of internal distributors that purchase top-of-book data from other exchanges as competing exchanges do not typically make this information publicly available due to the commercially sensitive nature of such information.

data that has proven valuable for investors, particularly as the Exchange grows market share due to its innovative market model that has been successful in attracting retail limit orders, increasing the Exchange's market share to more than 7.5% consolidated U.S. equities volume.³² The EDGX Top Feed is a competitively-priced alternative to top-of-book data disseminated by other national securities exchanges. It is purchased by a wide variety of market participants and vendors, including data platforms, websites, fintech firms, buy-side investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, the EDGX Top Feed benefits a wide range of investors that participate in the national market system. As discussed, the decision to purchase a particular market data product from a particular exchange is largely based on two factors: (1) The quality of the data, and (2) the price charged for access to that data. The Exchange believes that the EDGX Top Feed is competitive on both of these factors.

First, the EDGX Top Feed would remain competitively priced compared to similar products offered by other comparable U.S. equities exchanges. Although the EDGX Top Feed is not offered free of charge like certain other competitor offerings, particularly those offered by newer U.S. equities exchanges that are seeking to grow market share, it is made available at a price that is significantly lower than the prices charged by the Exchange's main competitors—*i.e.*, those with comparable market shares and data quality. Notably, even with the proposed fee increase, the EDGX Top Feed would remain significantly cheaper than similar products offered by New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("Arca"), and Nasdaq both in terms of the fees charged for internal distribution and the fees charge for each Professional User that is provided access to the feed. For example, NYSE charges a total of \$3,000 per month for internal distribution of their equivalent products, *i.e.*, \$1,500 per month for applicable top-of-book quotation information,³³ and an additional \$1,500 per month for transaction information,³⁴ both of which

are included in the EDGX Top Feed for a single fee.³⁵ Arca, which has a similar pricing model to NYSE, also charges a higher rate of \$1,500 per month for internal distribution of its equivalent products, separated into a \$750 per month charge for top-of-book quotation information and an additional \$750 per month charge for transaction information.³⁶ Finally, Nasdaq charges its internal distributors a fee of \$1,500 per month for Nasdaq Basic, which includes both top-of-book quotation information and transaction information for the same fee, similar to the Exchange's pricing model, but again at a higher cost.³⁷ In each case, the internal distribution charges associated with obtaining comparable U.S. equities market data from NYSE, Arca, and Nasdaq runs at least double and up to four times as much as the proposed fee to be charged by the Exchange, meaning that the Exchange would continue to be offering its data at a price that is attractive compared to the prices charged by its competitors. Similarly, each of these exchanges charges a fee for each professional subscriber.³⁸ Those professional subscriber fees are each higher than that proposed by the Exchange—*i.e.*, \$26 per month for Nasdaq,³⁹ and \$8 per month total for both NYSE and Arca.⁴⁰

Second, the proposed fees are reasonable given the value of the data provided in the EDGX Top Feed and used by data recipients in their profit-generating activities. The EDGX Top Feed provides top-of-book quotations and transactions executed on the

Exchange, and provides a valuable window into the market for securities traded on a market that accounts for more than 7.5% of U.S. equity market volume today.⁴¹ As discussed, the Exchange offers the EDGX Top Feed in a competitive environment where firms may freely choose which market data products best suit their business needs. Invariably, firms that choose to purchase the EDGX Top Feed instead of receiving one of the many free products offered by other exchanges,⁴² including free products offered by an affiliate of the Exchange,⁴³ have decided that the value of the EDGX Top Feed is greater than that offered by those other products. The Exchange consistently ranks among the top U.S. equities exchanges in terms of various market quality measures, *e.g.*, NBBO quote quality and NBBO market share.⁴⁴ Indeed, by attracting liquidity providing orders, *e.g.*, through retail priority, the Exchange is able to offer market data products that benefit from increased market quality. In turn, investors may choose to rely on the Exchange's market data products instead of other competitor offerings based on the value they provide in relation to any additional cost associated with obtaining that market data from the Exchange. For example, investors may wish to obtain market data from an exchange that has a higher time at the inside, as data obtained from an exchange that is quoting more often at the NBBO may better reflect the applicable market for securities it trades. Similarly, an exchange with greater overall market share will produce more transaction information that may be valuable to consumers of its data. Improvements in market quality will therefore directly impact the value of the market data that an exchange is able to offer to investors.

iii. The Proposed Fees Are Equitable and Not Unfairly Discriminatory as Internal Distributors will be Subject to Uniform Pricing Based on Their Usage of the Data and Differences Between the Fees Charged for Internal and External Distribution Are Appropriate

The Exchange believes the proposed fees for internal distribution of the EDGX Top Feed will continue to be allocated fairly and equitably among subscribers, and are not unfairly

³⁵ See *supra* note 4 and accompanying text. The Exchange also offers a separate market data product, *i.e.*, EDGX Last Sale, that exclusively provides last sale information. See EDGX Rule 13.8(d). However, all of the information contained in the EDGX Last Sale Feed is also made available in the EDGX Top Feed at no additional charge.

³⁶ See NYSE PDP Market Data Pricing, Section 3.3, NYSE Arca BBO; NYSE PDP Market Data Pricing, Section 3.4, NYSE Arca Trades.

³⁷ See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(c)(1). In addition, Nasdaq also charges distributors a \$100 monthly administrative fee. See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 135.

³⁸ These exchanges use a definition of "professional subscriber" that is substantially similar to the Professional User definition used by the Exchange. See *e.g.* Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(d)(4)(B); NYSE Nonprofessional Subscriber Policy, available at https://www.nyse.com/publicdocs/nyse/data/Policy-Non-ProfessionalSubscribers_PDP.pdf.

³⁹ Nasdaq's Professional User fee is divided into Nasdaq issues (\$13), NYSE issues (\$6.50), and other issues (\$6.50) for a total of \$26 per month for each Professional User. See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(b)(1).

⁴⁰ NYSE and Arca's fees are both broken down into \$4 per month for BBO information and an additional \$4 per month for Trades information. See *supra* notes 33, 34, and 36.

⁴¹ See https://markets.cboe.com/us/equities/market_share/.

⁴² See *e.g.*, Investors Exchange Fee Schedule, Market Data fees.

⁴³ See *e.g.*, Cboe EDGA Exchange, Inc., Fee Schedule, EDGA Top.

⁴⁴ See https://www.cboe.com/us/equities/market_statistics/market_quality/.

³² See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

³³ See NYSE PDP Market Data Pricing, Section 1.3, NYSE BBO.

³⁴ See NYSE PDP Market Data Pricing, Section 1.4, NYSE Trades.

discriminatory, as the proposed fees will apply equally to all data recipients that choose to subscribe to the EDGX Top Feed and distribute that data to internal subscribers. As proposed, all internal distributors of the EDGX Top Feed will be subject to the same internal distribution fee, regardless of the type of business that they operate, or the use they plan to make of the data feed. Thus, all internal distributors would have access to the EDGX Top Feed on the same equitable and non-discriminatory terms. Similarly, with the introduction of Professional User fees, internal distributors of the EDGX Top Feed will be subject to the same modest fees based solely on the number of Professional Users that each internal distributor has chosen to permission for access to this information. The Exchange does not believe that it is inequitable, or unfairly discriminatory, to charge a fee based on the number of Professional Users within a firm that have access to the EDGX Top Feed as this ensures that firms with the highest usage pay their equitable share for the data.

The Exchange also believes that it is fair and equitable, and not unfairly discriminatory, to continue *not* to charge a fee for internal distribution to Non-Professional Users. The Exchange's fee structure is generally designed to facilitate lower cost access to its market data by retail investors, either through substantially lower User fees for Non-Professional Users, or other incentive programs, such as the Small Retail Broker Distribution Program, which was recently implemented to lower the cost of the Exchange's market data to small broker-dealers that serve retail investors. The Exchange does not believe that any significant number of Non-Professional Users to [sic] receive EDGX Top Feed Data through internal, *i.e.*, within the distributor's firm, as opposed to external distribution, and in the event that certain firms may distribute data internally to Users that qualify as Non-Professional, providing such Users access without any User fees would facilitate the Exchange's overall goals of facilitating access to its data by retail investors, which the Commission has continually found to be consistent with the Exchange Act.

Finally, the Exchange believes that it is fair and equitable, and not unfairly discriminatory to continue to charge different fees for internal and external distribution of the EDGX Top Feed. As is common practice, the Exchange charges lower fees to distributors that use its market data products for internal distribution only than to distributors that redistribute that data externally to

their customers. In the case of the EDGX Top Feed, external distributors are subject to a higher distribution fee, and are also subject to Non-Professional User fees, which as discussed above the Exchange has determined to continue not to charge to internal distributors.⁴⁵ Increasing the fees that the Exchange charges for internal distribution of the EDGX Top Feed, as proposed, would actually serve to *decrease* the disparity in charge between internal and external distribution, while at the same time continuing to facilitate the internal distribution of the EDGX Top Feed at a lower cost. The Exchange continues to believe that it is appropriate to distinguish between internal and external distributors in setting fees for the EDGX Top Feed as external distributors can redistribute the Exchange's market data to its clients for a fee, whereas internal distributors are not allowed to redistribute the data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by competition among exchanges that offer similar data products to their customers. Top-of-book data is broadly disseminated by competing U.S. equities exchanges. There are therefore a number of alternative products available to market participants and investors, including products offered by certain competing exchanges without charge. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as market data customers look to purchase cheaper top-of-book data products, and quality, as market participants seek to purchase data that represents significant market liquidity.

Intramarket Competition. The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. As discussed, the proposed fees would apply to all internal distributors of the EDGX Top Feed on an equal and non-discriminatory basis, and the continued

difference in fees for internal and external distribution are appropriate given the ability for external distributors to redistribute data externally to their clients. The Exchange therefore believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue burden on competition.

To the extent that particular fees would apply to only a subset of subscribers, *e.g.*, Professional versus Non-Professional Users, those distinctions are not unfairly discriminatory and do not unfairly burden one set of customers over another. As discussed, the Exchange does not believe that any significant number of Non-Professional Users receive EDGX Top Feed Data through internal distribution. Further, to the extent that any Non-Professional Users receive the EDGX Top Feed through internal distribution, the Exchange believes that it is not unfairly discriminatory not to charge a fee for their usage as this would facilitate the dissemination of market data to retail investors.

Intermarket Competition. The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate in furtherance of the purposes of the Act. In setting the proposed fees, the Exchange is constrained by the availability of numerous substitute products offered by other national securities exchanges. Because market data customers can find suitable substitute feeds, an exchange that overprices its market data products stands a high risk that users may substitute another product. These competitive pressures ensure that no one exchange's market data fees can impose an undue burden on competition, and the Exchange's proposed fees do not do so here.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁴⁶ and paragraph (f) of Rule 19b-4⁴⁷ thereunder. At any time within

⁴⁵ See EDGX Schedule of Fees, EDGX Top. The proposed Professional User fee for internal distribution of the EDGX Top Feed is the same as currently charged for external distribution of that market data product. *Id.*

⁴⁶ 15 U.S.C. 78s(b)(3)(A).

⁴⁷ 17 CFR 240.19b-4(f).

60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2021-014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to File Number SR-CboeEDGX-2021-014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are

cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2021-014 and should be submitted on or before April 13, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁸

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91343; File No. SR-NYSE-2020-98]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Its Rules To Prohibit Member Organizations From Seeking Reimbursement, in Certain Circumstances, From Issuers for Forwarding Proxy and Other Materials to Beneficial Owners

March 17, 2021.

I. Introduction

On November 30, 2020, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules to prohibit member organizations from seeking reimbursement from issuers for forwarding proxy and other materials to beneficial owners who received shares from their broker at no cost or at a price substantially less than the market price in connection with a promotion by the broker. The proposed rule change was published for comment in the **Federal Register** on December 18, 2020.³ On

⁴⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90653 (December 14, 2020), 85 FR 82539 ("Notice"). Certain comments filed in response to File No. SR-NYSE-2020-96 by Paul Conn, President, Global Capital Markets, Computershare, dated January 11, 2021 ("Computershare Letter"), and Niels Holch, Executive Director, Shareholder Communications Coalition, dated January 20, 2021 ("Coalition Letter"), also address this proposed rule change. These comments on the proposed rule change are

January 29, 2021, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

NYSE Rules ("Rule") 451 and 465 require NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of issuers.⁷ For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution.⁸ This reimbursement structure stems from SEC Rules 14b-1 and 14b-2 under the Act,⁹ which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials. These rules require companies to send their proxy materials to broker-dealers or banks, who are nominees that hold securities in street name, for forwarding to beneficial owners, and to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners.¹⁰ The Commission's rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that

available at: <https://www.sec.gov/comments/sr-nyse-2020-98/srnyse202098.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 91011, 86 FR 8246 (February 4, 2021). The Commission designated March 18, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Rules 451 and 465; Notice, *supra* note 3, at 82539. The ownership of shares in street name means that a shareholder, or "beneficial owner," has purchased shares through a broker-dealer or bank, also known as a "nominee." In contrast to direct ownership, where shares are directly registered in the name of the shareholder, shares held in street name are registered in the name of the nominee, or in the nominee name of a depository, such as the Depository Trust Company. See Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530 n.14 (October 24, 2013) (order approving SR-NYSE-2013-07) ("2013 Approval Order").

⁸ See Rule 451 and 465; 2013 Approval Order, *supra* note 7, at 63531.

⁹ 17 CFR 240.14b-1; 17 CFR 240.14b-2.

¹⁰ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, *supra* note 7, at 63531.